No. 80-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY, INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

BRIEF FOR RESPONDENTS

JEROME B. LURIE
COHN GLICKSTEIN LURIE OSTRIN LUBELL & LUBELL
1370 Avenue of the Americas
New York, New York 10019
(212) 757-4000
Counsel for Respondents

Of Counsel:

SIDNEY E. COHN
MARY K. O'MELVENY
NAN BASES

SAMUEL ESTREICHER
40 Wash. Sq. So.
New York, N.Y. 10012

Counterstatement of Question Presented

Whether the Court of Appeals correctly concluded that a union's longstanding agent regulations, instituted and maintained to preserve union wage scale and standards and protect union members in their dealings with agents who effectively control access to employment, are protected by the labor exemption to the antitrust laws established by the Clayton Act of 1914, 15 U.S.C. § 17, 29 U.S.C. § 52, and the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115.

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In the

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. Artists & Associates, Inc., S.T.E. Representation Ltd., J. Michael Bloom, Ltd., Don Buchwald & Associates, Inc., Marje Fields, Inc., Henderson/Hogan Agency, Inc., Oppenheim-Christie Associates Ltd., Joel Pitt Ltd., Talent Representatives Inc., D.M.I. Talent Associates, Ltd., Jean Thomas Agency, Inc., Bob Waters Agency, Inc., Jacobson-Wilder, Inc., William D. Cunningham & Associates, Inc., Tranum Robertson & Hughes, Inc., Monty Silver Agency Ltd., Bret Adams Limited, Michael Thomas Agency, Inc., Lester Lewis Associates, Inc., Leaverton Associates Ltd., Joe Jordan Talent Agency Inc., Raglyn-Shamsky, Ltd., Ann Wright Representatives Inc.,

Petitioners,

—against—

Actors' Equity Association, an unincorporated association, and Donald Grody,

Respondents.

BRIEF FOR RESPONDENTS

Statement of the Case

A. *Introduction*

This case involves the fifty-year old agent regulations promulgated and maintained by respondent Actors' Equity Association ("Equity") for the protection of its members in their dealings with theatrical agents who stand between actors and jobs in a manner vitally affecting actors' access

to employment and the terms and conditions thereof. Equity's agent regulations were determined by both courts below to be protected by the statutory labor exemption to the antitrust laws. 622 F.2d 647 (2d Cir. 1980) [J.A. 332]; 478 F. Supp. 497 (S.D.N.Y. 1979) [Pet. App. B1].[1]

B. *Statement of Facts*

Equity has represented actors working in the legitimate theatre since the early part of this century. It is a national union which seeks to improve the wages and working conditions of stage actors by securing collective bargaining agreements with producers throughout the United States. Equity's collective bargaining agreements prescribe minimum wages and other terms and conditions of employment, while permitting the individual actor to bargain for terms exceeding minimum.[2]

Early on, it became apparent to Equity that protection of its members in their terms and conditions of employment required regulation of theatrical agents in the business of obtaining jobs for actors and negotiating individual terms with producers in return for a cut of the actor's wages. The historic scarcity of jobs and high unemployment in the legitimate theater rendered actors acutely vulnerable to exploitation by theatrical agents who effectively controlled access to jobs. Such vulnerability was (and remains) particularly great for actors without an

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[1] "J.A." refers to the Joint Appendix. ("Pet. App.") refers to petitioners' appendix to the Petition for Certiorari. "R" refers to the record. References to pages in Pet. App. denominated *"(continued)"* will appear in the following form: *e.g.*, "Pet. App. B1(c)-B2."

[2] The minimum or "scale" wage varies, depending upon the type of production. As of August 1977, the minimum weekly salary for Broadway shows—the most desirable and difficult placement for actors in the legitimate theatre—was $355.00; Off-Broadway it was $175.00 per week [J.A. 221].

established reputation who comprise the overwhelming majority of Equity's membership. Abuses by such agents, including the extraction of high commissions which undermined union scale, prompted Equity in 1928 unilaterally to promulgate regulations designed to protect its members in their dealings with agents. The regulations prohibited Equity members from dealing with agents who would not agree to represent them in accordance with Equity-prescribed conditions, including ceilings on the commissions which could be charged. Equity members were permitted to deal only with agents who indicated their willingness to conform to standards designed to protect Equity's members, by obtaining a permit from Equity. Members who dealt with nonlicensed agents were subject to union discipline [J.A. 49].[3]

The circumstances necessitating Equity's promulgation of agent regulations in 1928 have remained essentially unchanged. The vast majority of Equity's membership is at any given time unemployed, and agents continue effectively to control access to scarce job opportunities. "As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an

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[3] In upholding the regulations in 1929, the Second Circuit, per Swan, J., noted that the "evils of unregulated [theatrical agents]" were "set forth in defendants' affidavits and . . . corroborated by common knowledge." *Edelstein* v. *Gillmore,* 35 F.2d 723, 726 (2d Cir. 1929), *cert. denied,* 280 U.S. 607 (1930). Among the evils described in those affidavits were excessive commissions (in contravention of New York statutory limits on commissions); long-term contracts imposing obligations and restrictions on the actor without any corresponding obligations on the agent; and other breaches of the fiduciary relationship between agent and actor. *See also* A. Harding, Revolt of the Actors (1929) [J.A. 291-331]. The potential for worker abuse by private employment agencies is well documented. *See Ribnik* v. *McBride,* 277 U.S. 350, 359 (1928) (Stone, Holmes, & Brandeis, JJ., dissenting); *Adams* v. *Tanner,* 244 U.S. 590, 597, 600 ff. (1917) (Brandeis, J., dissenting)

actor without an agent does not have the same opportunity to be taken seriously as an actor who has an agent." 478 F. Supp. at 497 [Pet. App. B2(c)-B3].[4]

The essential elements of Equity's agency regulations have similarly remained unchanged since 1928. [J.A. 49-50][5] Equity members are prohibited on pain of union

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[4] "Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audience for his client." 478 F. Supp. at 497 [Pet. App. B2(c)-B3]. Principal interviews give the actor a chance to talk to a producer representative for a minute or two, but no opportunity "to audition", *i.e.*, read for the role. It is at the audition, not the principal interview, where the actor has the opportunity actually to display his acting ability. The actor who relies on principal interviews is far less likely to be called for an audition than the actor who is referred by an agent [J.A. 155-161, 129, 144-145, 147-149].

[5] The agent regulations have undergone revisions in some details over the years, as a result of input from Equity's membership and from agents through theatrical Artists Representatives Associates ("TARA"), which until shortly before this litigation was the only association voicing the concerns of agents relating to their representation of Equity members. Many of the petitioners were, until their voluntary resignation in late 1977, members of TARA. [J.A. 60] TARA functions only in the legitimate theatre field. The National Association of Talent Representatives, to which petitioners now belong, functions also in the field of motion pictures and television, where agents, including petitioners, operate under analogous agent regulations maintained by the Screen Actors' Guild and the American Federation of Television and Radio Artists. [J.A. 74]

Each agency which belonged to TARA had one vote, regardless of size, and all TARA members who wished to participate in discussions with Equity were welcome to do so. [R. 43 (pp. 330, 353)]. While an agent from William Morris, a large agency, served as TARA's secretary, TARA's president was a small agent and petitioner agents held the offices of treasurer and vice-president. [R. 43 (pp. 240-241, 242, 328-329)] The parties stipulated that membership in TARA is not a precondition of being licensed by Equity. [J.A. 50]. The District Court found that petitioners did not "demonstrate[ ] that Actors Equity's regulation of agents was either applied in a discriminatory fashion favoring TARA agents or was designed to operate for the advantage of TARA agents," 478 F.2d at 503 [Pet. App. B8(c)].

discipline from using agents who have not, through the mechanism of obtaining an Equity license, agreed to comply with a set of union-promulgated rules designed for members' protection. 478 F. Supp. at 497 [Pet. App. B2(c)-B3]. The union's restrictions on commissions provide, in essence, that actors' earnings are commissionable at ten percent of the entire amount of salary so long as it does not result in the actor receiving less than minimum wage negotiated by Equity. 478 F. Supp. at 498 [Pet. App. B3(c)-B4].

Commissions in this industry are not necessarily related to effort by the agent. Agents often function as little more than "order takers." Merely answering a producer's telephone call can result in collecting ten percent of an actor's weekly salary for as long as the show runs [J.A. 167]. Similarly, agents can collect commissions on salaries of actors they represent even if the actor obtains the job without the agent [J.A. 168-169, 149-150]. In representing less established actors, agents hope to develop relationships which will become continually more remunerative as the actor's reputation grows and he can demand higher salaries. Agents select those actors whom they believe to have the potential for success. No agent is required to represent any actor the agent does not wish to represent.

In addition to establishing ceilings on commissions, Equity's regulations seek to insure that agents fulfill the fiduciary obligations inherent in the agency relationship, and are designed to protect the actor from locking himself into unreasonable exclusive agreements because of his vulnerability to anyone who offers the promise of employment [J.A. 249-260, 273-275]. Equity limits the duration of exclusive agreements and provides that the actor be permitted to withdraw from such arrangement if the agent

has been unable to secure employment for the actor within prescribed time periods, or upon the departure from the agency of the persons on whom the actor specifically relied in signing with the agency. Because the agents take a percentage of clients' salaries regardless of the extent of involvement in obtaining the work, they have an incentive to sign on as many actors as possible irrespective of capability of servicing them. Equity's regulations provide the actor with relief from unreasonably long, unproductive exclusive arrangements, while leaving agents free to develop long-term relationships with actors they in fact assist [J.A. 119-120].[5a]

The agent regulations constitute, in short, "a union's effort to regulate parties, who, because of industry structure," control access to opportunities and, "stand athwart the current of wages paid by employers to union members," 622 F.2d at 650 [J.A. 347].

Summary of Argument

Equity's longstanding regulation of agents for the purpose of promoting fair access to jobs and upholding union wage scales and standards is protected by the statutory exemption from the antitrust laws created by the Clayton

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[5a] Equity's agent regulations have largely but not completely remedied the abuses which prompted them. The proverbial "casting couch" has not been eliminated [J.A. 163], nor has agent pressure for commissions exceeding ten percent of wages [J.A. 161-162]. Agents have unfairly excluded actors from competition by falsely assuring them that they would be submitted for particular roles when, in fact, favored actors were referred instead. [J.A. 206]. Agents have collected commissions from actors notwithstanding conflicts of interest, e.g., while functioning as "packagers" [J.A. 131-132] or as casting director for the producer [J.A. 136-137].

and Norris-LaGuardia Acts. As interpreted in *United States* v. *Hutcheson,* 312 U.S. 219 (1941) and *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968), the labor exemption shields a union's efforts to protect its members by regulating employment agents who are engaged in the sale of members' labor. In a labor system where agents are necessary for access to jobs, a union furthers its traditional goal of eliminating wage and job competition by insuring that its members do not compete for agents' services in a manner that undermines union wage scales and standards. The purpose and effect of union activity in this case is restricted to such labor market concerns. In *Carroll,* essentially identical union regulation of commissions and representation activity of booking agents was held antitrust exempt, and petitioners have advanced no justification for overruling *Carroll.*

Equity's agent regulations are protected by the *Hutcheson* exemption for unions acting in their self-interest and not in combination with nonlabor groups. Equity's members are plainly engaged in a "labor dispute," within the ambit of the Clayton and Norris-LaGuardia Acts, with agents such as petitioners who arrange and negotiate terms and conditions of employment. Equity furthers its central purpose as a union representing its members in the sale of their labor by protecting them in their dealings with agents who perform complementary functions in the labor market. No conspiracy or combination with employer groups or with one agent group to disadvantage another is involved in this case. Equity's requirements benefit only union members, exclude no agent complying with them, and are implemented solely through the concerted action of members.

Carroll establishes that permissible union interest and action within the *Hutcheson* exemption encompass not only

situations where the entrepreneurs are doing union members' work, but also "economic interrelationship[s] affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. Here, as in *Carroll,* the union regulates agent commissions and representation activity of agents in order to ensure fair dealings and maintenance of minimum standards in the performance of agents' job placement and bargaining functions. These functions, frequently performed exclusively by unions in non-entertainment industries, plainly place the agents in an economic interrelationship with Equity members affecting legitimate union interests.

No authority exists for denying the labor exemption to Equity's agent regulations. There is no suggestion that Equity regulates agents for any purpose other than the protection of its membership. Nor is there any danger in this case of an anticompetitive business conspiracy which the union assists in the hope of sharing supracompetitive profits as higher wages. *Compare Allen Bradley* v. *Electrical Workers,* 325 U.S. 797 (1945), and its progeny. Equity's members would derive no benefit from conferring monopoly power on particular agents or groups of agents. Indeed, Equity has every interest in encouraging vigorous competition among agents. Its sole concern is that competition not take place in a manner compelling members to absorb wage cuts in the form of commissions invading minimum wage scale or subjecting them to unfair practices.

Petitioners' attempts to sidestep the controlling force of *Carroll* are without merit. None of the purported distinctions raised by petitioners withstands analysis, as is shown in detail below. In sum, petitioners offer no justification for overruling a statutory precedent, which has engendered sparse litigation, has been applied without difficulty in the lower courts and is fully consistent with labor-antitrust jurisprudence.

ARGUMENT

Equity's Longstanding Regulation of Agents for the Purpose of Promoting Fair Access to Jobs and Upholding Union Wage Scale and Standards Is Protected by the Statutory Labor Exemption, as Developed in *Hutcheson* and *Carroll*.

A. Equity's Regulations Fall Squarely Within the *Hutcheson* Exemption for a Union Acting in Its Self-Interest and Not in Combination With Nonlabor Groups.

In *United States* v. *Hutcheson*, 312 U.S. 219 (1941), this Court held that under Sections 6 and 20 of the Clayton Act of 1914, 15 U.S.C. §17, 29 U.S.C. §52, and the Norris-LaGuardia Act of 1932, 29 U.S.C. §§101-115, labor unions acting in their self interest and not in combination with nonlabor groups enjoy a broad statutory exemption from Sherman Act scrutiny and liability. Distilling a history of congressional reaction to restrictive judicial interpretation of the proper sphere of union activity and concern, Justice Frankfurter's opinion for the Court declared:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under §20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted).

The labor exemption under *Hutcheson* derives from the Norris-LaGuardia Act, particularly the definition of "labor dispute" in Section 13, 29 U.S.C. §113, in which Congress "reasserted the original purpose of the Clayton Act by

infusing into it the immunized trade union activities as redefined by the later Act," *Hutcheson, supra,* at 236. Equity's members and agents such as petitioners are "engaged in the same industry . . . or have direct or indirect interests therein." In view of the agents' functions in securing employment and bargaining on behalf of Equity members, this is a "controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §113. Under *Hutcheson,* no federal injunction may issue and "§20 [of the Clayton Act] removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law." 312 U.S. at 236.

The premise of *Hutcheson* is that the antitrust laws have only a limited application to labor unions as such, and that Congress in the Norris-LaGuardia Act broadened the definition of "labor dispute" to ensure that a union is shielded from the Sherman Act when it seeks to improve the wages and working conditions of its members through the elimination or regulation of competition in the labor market. *See also Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504 (1940); *Hunt* v. *Crumboch,* 325 U.S. 821 (1945). In sum, in the Clayton and Norris-LaGuardia Acts, Congress rendered the Sherman Act "generally inapplicable to union efforts to achieve, to maintain, or to exploit monopoly in the labor market." Meltzer, Labor Unions, Collective Bargaining and the Antitrust Laws, 32 U.Chi. L. Rev. 659, 669 (1965).

A union forfeits its exemption under *Hutcheson,* however, when it combines with businessmen to help establish

a business monopoly. Thus, in *Allen Bradley* v. *Electrical Workers,* 325 U.S. 797 (1945), the Court held that a union violates the Sherman Act when it combines with manufacturers and contractors in erecting a sheltered local business market in order "to bar all other businessmen from [the market], and to charge the public prices above a competitive level." *Id.* at 809. As the business groups in that case had formed a conspiracy independently violative of the Sherman Act, "[a] business monopoly [was] no less such because a union participate[d], and such participation [was] a violation of the Act." *Id.* at 811.[6]

Application of the reasoning of *Hutcheson* and *Allen Bradley* to the facts of the instant case makes clear that Equity's longstanding agent regulations, instituted and maintained for the purpose of protecting union members from overreaching by agents and of safeguarding the union's minimum wage scale and other labor standards, are shielded by the statutory exemption.

In this case, Equity is simply advancing the economic interests of its members by protecting them from agents who, because of the structure of the legitimate theatre industry, control access to jobs and represent actors with respect to wages and other terms of employment. Agents perform functions— representing members with respect to the sale of their labor—that in non-entertainment industries are performed exclusively by unions. Agents' operations directly affect work opportunities and the integrity of union minimum scale and other standards. The com-

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[6] In *Hunt* v. *Crumboch, supra,* decided the same day, the Court ruled that the labor exemption protected a union's boycott of a truck hauler through successful secondary pressure on purchasers of its services with whom the union had contracts, because of the absence of union participation in a conspiracy with the hauler's competitors. *See* 325 U.S. at 824; *Meltzer, supra,* at 677 & n.74.

missions they seek directly and inevitably reduce the wages union members will receive. The union's representation of members with regard to the sale of their labor necessarily requires consideration of the complementary role of agents; its regulation of agents operates solely to the immediate and direct benefit of members; and it furthers its aim by a concerted refusal of members to patronize agents wo do not comply with union requirements.

This case comes to the Court without any element of conspiracy or combination with employer groups, or with one agent group to disadvantage another. After a full trial, the District Court found "no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and TARA or between Actors' Equity and producers," 478 F. Supp. at 499 [Pet. App. B4(c)-B5], and that petitioners had "not demonstrated that Actors' Equity regulation of agents was either applied in a discriminatory fashion favoring TARA agents or was designed to operate to the advantage of TARA agents." *Id.* at 503 [Pet. App. B8(c)]. These findings were not disturbed on appeal and are not challenged here.[7] All agents are restricted in the same manner by the union; none who comply with Equity's regulations are excluded from the opportunity to compete to represent union members. Moreover, Equity has no incentive to create a sheltered market for any agent or group of agents by eliminating competitors, and has every incentive to maximize competition

[7] Despite a faint intimation in petitioners' brief (Pet. Br. 3, n. 2), no meaningful distinction can be drawn between TARA members and petitioners. See p. 4, n. 5, *supra*. Even with respect to scale jobs, while William Morris did not frequently represent scale performers, neither did the only petitioner to testify [J.A. 112-115a]. As noted in petitioners' brief (Pet. Br. 8-9), TARA vigorously opposed Equity's prohibition of commission on minimum scale.

among agents. Thus, this case presents neither an actual nor a potential *Allen Bradley* situation and in this respect is distinguishable from every case in modern times in which the Court has denied the labor exemption to union activity.[8]

B. Under *Carroll*, Equity Did Not Combine With a Nonlabor Group in Regulating the Agents' Control Over Access to Employment and Impact on Wages and Other Labor Standards.

Petitioners contend that Equity's system for protecting its members in the job market falls outside of the statutory exemption because of an "agreement" with a "nonlabor group" in the form of union licensing of employment agents. This contention was squarely rejected in *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968), involving another entertainment union's regulation of booking agents.

Petitioners' central argument in this case seems to be that Equity may not seek to regulate the commissions charged or other aspects of the representation of their members by agents despite the immediate impact of agent practices on job opportunities, wages and working conditions, because agents are neither in wage or job competition with actors nor employers with whom the union has collective bargaining agreements (see Pet. Br. 18, 26, 34 & n. 16). This is an attempt to return to the era preceding

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[8] See pp. 24-27, *infra*. In cases where union agreements with nonlabor groups present potential *Allen Bradley* situations, in that they may have the effect of sheltering signatory businesses from competition in product markets, the Court has recognized a nonstatutory exemption to shield agreements that are intimately related to wages, hours and working conditions. *See, e.g., Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

the Norris-LaGuardia Act, which was enacted in response to judicial limitation of the proper sphere of labor conflict and concern[9] and "established that the allowable area of union activity was not to be restricted . . . to an immediate employer-employee relation." *United States* v. *Hutcheson,* 312 U.S. at 231. Petitioners seek to bypass not only *Carroll* but also *New Negro Alliance* v. *Grocery Co.,* 303 U.S. 552 (1938), involving a civil rights group's picketing in protest of the discriminatory employment practices of a firm with whom neither the group nor its members sought employment, and several pre-*Carroll* cases upholding union regulation of the practices of independent entrepreneurs having an impact on the wages and working conditions of members, see *Milk Wagon Drivers' Union* v. *Lake Valley Co.,* 311 U.S. 91 (1940); *Teamsters Union* v. *Oliver,* 358 U.S. 283 (1959) (*"Oliver I"*); *Teamsters Union* v. *Oliver,* 362 U.S. 605 (1960) (*"Oliver II"*).

Milk Wagon Drivers and the *Oliver* rulings make clear that a union's campaign to maintain labor standards may extend to independent businessmen who seek to do the same work as union members. In *Milk Wagon Drivers,* the Court held that a union of milk drivers was engaged in a "labor dispute" within the meaning of the Norris-LaGuardia Act when it sought to organize independent "vendors" who supplied milk to retail stores. "Whether rightly or wrongly," Justice Black noted, "the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." 311 U.S. at 98-99. The Court in *Oliver I* invoked *Milk Wagon*

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[9] *See, e.g., Duplex Co.* v. *Deering,* 254 U.S. 443 (1921); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U.S. 37 (1927).

Drivers to hold lawful a union's successful campaign to prescribe through collective bargaining agreements the minimum rental independent owner-operators could charge when leasing their vehicles to carriers. Application of state antitrust laws was rejected because the "objective [was] to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." *Id.* at 293-294. The Court reasoned that "the point of the Article [was] obviously not price fixing but wages. The regulations embod[ied] . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." *Id.* at 294.[10]

Carroll establishes that permissible union interest and action within the ambit of the labor exemption encompass not only situations where the entrepreneur is doing union members' work but also other "economic interrelationship[s] affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. Two different categories of union regulations were considered in *Carroll.* The first involved price floors and other restrictions imposed on orchestra leaders who dealt with the purchasers of the music. Justice Brennan's opinion for the Court held that the price floors were not subject

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[10] On remand, the state court interpreted *Oliver I* as inapplicable to independents in the capacity of "lessor-owner and employer of drivers of his equipment," and thus continued to enjoin enforcement of the union-carrier requirement that hired or leased equipment, if not owner-driver, be operated only by employees of certificated carriers and that carriers use their own available equipment before leasing extra equipment from the independents. In *Oliver II,* the Court's *per curiam* decision stated that "these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions" passed on in *Oliver I.* 362 U.S. at 606.

to the Sherman Act whether or not there was job competition between orchestra leader and employee-musician. See 391 U.S. at 106-112.[11] The second type of regulation at issue in *Carroll* restricted the commissions and booking activity of booking agents and caterers who were not involved in wage or job competition with union members. The Court held that such restrictions "'are *at least* as intimately bound up with the subject of wages,' *Oliver II, supra,* at 606, as the price floors." 391 U.S. at 113 (emphasis supplied).

The union's restrictions on agent commissions and booking activity presented a far less difficult issue for the *Carroll* Court than the price floors imposed on orchestra leaders, the minimum price scale for independent owner-operators in *Oliver I,* or the union's organizing of "vendors" in *Milk Wagon Drivers.* The booking agent restrictions were "at least as intimately bound up with the subject of wages" as the price floors imposed on the orchestra leaders, because the former did not involve union control of the prices to be charged the ultimate purchaser of the union members' services, and there was no danger that the immediate beneficiary of the union-set "price" would be the booking agents rather than the workers themselves. Here, as in *Carroll,* the restrictions are concerned exclusively with protecting job opportunities and wages. Equity's "regulations embody a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" *Oliver I, supra,* at 294, and to undermine fairness and regularity in the process of obtaining work in this industry.

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[11] Even when the leader did not perform or displace an employee-musician, price-cutting by leaders might lead to "skimping" on the wages paid to musicians. 391 U.S. at 111-112.

In *Carroll*, District Judge Levet held that the American Federation of Musicians ("AFM")'s licensing of booking agents and fixing of maximum commissions were entitled to the statutory exemption under *Hutcheson*. 241 F. Supp. 865, 892-893 (S.D.N.Y. 1965). He noted that the union instituted this system to eliminate agent practices "which undermined the musicians' wage structure," *id.* at 892.[12] A parallel to the legitimate theatre field was explicitly drawn: "Apparently, similar abuses by booking agents existed in other fields, too. *Edelstein* v. *Gillmore*, 35 F.2d 723, 726 (2d Cir. 1929) (actors)." He rejected the contention that the AFM could not regulate the commissions and other practices of the booking agents because they were "independent contractors performing different functions than a union's members and not in competition with union members for jobs," 241 F.Supp. at 892. In the absence of wage or job competition, the booking agents were a "labor group" because of the presence of an "economic interrelationship affecting legitimate union interests between union members and the independent contractors," 241 F.Supp. at 887.[13] Drawing support from Section 13 of the Norris-

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[12] Petitioners mischaracterize the AFM regulations by asserting that they were concerned only with "exorbitant commissions" (Pet. Br. 22, n. 10). The AFM licensing agreement introduced as an exhibit at the *Carroll* trial bars any agent commission or compensation which has "the effect, directly or indirectly, [of] reduc[ing] the net compensation or pay of any member for his services to less than the minimum scale of pay provided by the Federation or its Locals." [J.A. 285; 74-75]. Moreover, while petitioners note that booking agents in *Carroll* were allowed to charge 15% maximum commissions, they fail to point out that New York then as now permitted up to 20% commissions for orchestra bookings in opera and concert fields. New York General Business Law, Section 185, par. 8. [Pet. App. G-7].

[13] The District Court cited *Los Angeles Meat and Provision Drivers Union* v. *United States*, 371 U.S. 94, 98, 103 (1962); *id.* at 104 (Goldberg, J., concurring). *See* 241 F.Supp. at 892. Con-

LaGuardia Act,[14] Judge Levet in *Carroll* concluded that a union could regulate the activities of the booking agents because they "have and had a direct and substantial effect on the wages of the members," and the regulations were "reasonably related to [the union's] interest in maintaining observance of union scale wages and working conditions." *Id.* at 893.[15]

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trary to petitioners' characterization (Pet. Br. 23, n. 11), the "grease peddlers" in *Meat Drivers conceded* that they were not in wage or job competition or other economic interrelationship with the other members of the union. *See* 371 U.S. at 101. Justice Goldberg's opinion explained that the peddlers could not be members of the union, "not because there is absent the job or wage competition erroneously considered critical by the District Court, but because there does not appear in the record any other legitimate labor union interest presently being served by organization of these peddlers." *Id.* at 104-105 (Goldberg, J., concurring).

Both *Meat Drivers* and *United States* v. *Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960), involved combinations of independent businessmen organized as "sham" labor unions. Petitioners do not suggest that either Equity's actors or the AFM's musicians in *Carroll* constituted such a "sham" labor group. Equity is "a labor union and its spur to action related to wages and working conditions." *Allen Bradley, supra,* 325 U.S. at 807, n. 12.

[14] Judge Levet stated:

> This definition of a labor dispute is the source of the test of actual competition or other economic interrelationship between independent contractors and union members for determining whether the former is a labor group that the union may regulate. *Los Angeles Meat Drivers etc.* v. *United States, supra; Milk Wagon Drivers Union etc.* v. *Lake Valley Farm Prods., Inc., supra.*

241 F. Supp. at 893.

[15] Judge Levet employed a similar analysis to uphold the union rule *prohibiting* booking activities by caterers who were "also independent contractors not in job or wage competition with union members, [but] in a unique position to affect the choice of orchestras by purchasers of music and the wages and working conditions of musicians." 241 F. Supp. at 893. This ruling was also affirmed. 391 U.S. at 113-114.

This Court sustained Judge Levet's definition of a "labor group," see 391 U.S. at 106, and affirmed his ruling that the union's regulation of booking agents was exempt from the antitrust laws:

> We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," *Oliver II*, *supra*, at 606, as the price floors [which the AFM imposed on orchestra leaders]. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." 241 F. Supp., at 881-882. On the basis of these findings, the District Court concluded:
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> "Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members . . . such that the [unions] are justified in regulating their activities . . . . Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions." 241 F.Supp., at 893.

391 U.S. at 113. The *Carroll* Court directed the Second Circuit "to enter a judgment affirming the judgment of the District Court in its entirety." *Id.* at 114.[16]

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[16] Petitioners' suggestion that *Carroll's* application of the labor exemption to union regulation of booking agents (and caterers) is dictum borders on the frivolous. The antitrust implications of the booking agent restrictions was an issue tried (including testimony by eight full-time booking agents) and passed on by the trial court and briefed and adjudicated in this Court. *See* Appendix, *American Fed. of Musicians* v. *Carroll*, Nos. 309-310, O.T. 1967, pp. 108-111, 113 (pre-trial order); Cross-Petition for Writ of Certiorari,

The parallel between the facts of this case and the situation regarding the booking agents in *Carroll* is inescapable. As Judge Levet's reference to *Edelstein* v. *Gillmore, supra,* makes clear, Equity's agency regulation also have their genesis in abuses by agents who stand between actors and scarce employment opportunities.[17] In the legitimate theatre field, as in the instrumental music field, talent agents have a direct and substantial impact on the wages and working conditions of the employee. Theatrical agents affect not only the conditions under which the actor will work, but whether he will work at all.

Milk Valley Drivers, Oliver and *Carroll* demonstrate that a union's regulation of job and wage competition in the labor market—whether among its members or between members and third parties functioning in that market—falls squarely within the labor exemption. In labor systems where agents stand between union members and jobs, the exemption protects a union's effort to improve the lot of union members through regulation of the agents' functions in the labor market. In this case, as in *Carroll,* Equity regulates job and wage competition among its members by insisting that such competition take place in a manner ensuring compliance with union standards of fairness and regularity. As the Court of Appeals observed in this case, "[i]n industries where it is necessary or customary for

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No. 310, (O.T. 1966), pp. 2-3, 6 (questions presented: Nos. 1, 2, 4, 20); Brief for the American Fed. of Musicians, Nos. 309-310, pp. 15-16, 67-69; Cross-Petitioners (Plaintiffs') Brief, Nos. 309-310, pp. 27-28, 94-96.

[17] Petitioners mistakenly suggest (Pet. Br. 21-22) that under *Carroll* a union may not regulate agent commissions absent findings that agents charge exorbitant commissions at the time of litigation. The references in *Carroll* were to past abuses, and Judge Levet's opinion acknowledges that "[t]he objective of the [AFM] was the elimination of the practices which undermined the musicians' wage structure and the regulations adopted were successful." 241 F.Supp. at 892; *id.* at 882 (Finding No. 119).

union members to secure employment through agents," a "union cannot eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d at 650-651 [J.A. 347-348]. Similar reasoning applies to the other aspects of Equity's protective scheme, from its provision of relief from unreasonable exclusive arrangements with agents to the requirement that union members not be subject to personal indignities in the search for jobs.

Agents perform two basic functions for actors in the legitimate theatre which in non-entertainment industries are performed by unions: placing actors in jobs and negotiating wages and other terms of employment. Equity's agent regulations represent a union's longstanding effort to regulate the performance of such functions, in effect, as a substitute for maintaining a hiring hall and serving as the exclusive bargaining representative of its members for all terms of employment.

In several industries, notably construction, longshore and maritime, unions traditionally have maintained hiring halls and other job referral systems to protect workers from exploitation where work is typically temporary and intermittent in nature and is performed on separate project sites rather than fixed locations. As Senator Taft explained in 1947: "The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall." S.Rep. No. 1827, 81st Cong., 2d Sess. 13 (1947). The National Labor Relations Board and the courts have ruled that union demands for hiring halls are a mandatory subject of collective bargaining, and strikes to obtain such provisions are lawful, protected activity. *See, e.g., Houston Chapter, Assoc. General Contractors,* 143

NLRB 409 (1963), *enforced,* 349 F.2d 449 (5th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *NLRB* v. *Tom Joyce Floors Inc.,* 353 F.2d 768, 771 (9th Cir. 1965).

A common feature of casual labor markets is the potential for exploitation and abuse of participants hunting for jobs in such markets. By maintaining hiring halls, unions strive to eliminate abuses (such as kick-backs) and ensure fairness and regularity in the system of access to employment. Because of the particular characteristics and history of the legitimate theatre industry, independent businessmen—theatrical agents—arrange employment for actors. The agent regulations are designed to advance the protective goals furthered by the union hiring hall in other contexts.[18]

No principle of American labor law is more firmly established than the right of the duly authorized representative of workers in a unit to insist on exclusive representation with respect to wages, hours, and working conditions. See *J.I. Case Co.* v. *NLRB,* 321 U.S. 332 (1944); *Emporium Capwell Co.* v. *Community Org.,* 420 U.S. 50 (1975). *J.I. Case* acknowledges that "where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining." 321 U.S. at 338. That Equity has chosen to follow such a course does

[18] The regulations prescribe the duration of actors' contracts with agents, including provision for terminating contracts where agents are unable to obtain work for the actor over a period of time. Agents functioning in a dual capacity for actor and producer threaten to undermine a fiduciary obligation to the actor which his union may act to uphold. Restrictions on commissions is a form of regulation of the cost of obtaining work, which in other contexts is accomplished through union hiring halls or referral systems. Equity's attempt to protect its members from the abuses of the functional equivalent of a nonunion hiring hall is union activity in bona fide pursuit of traditional labor objectives.

not alter the fact that agents like petitioners are performing a function which the collective bargaining representative could choose to, and in most industries does, perform. Certainly the statutory exemption protects a union's efforts to regulate the conduct of union business agents in performing the bargaining function. To expose Equity to Sherman Act liability for regulating the conduct of third persons performing essentially the same function is to create an incentive to eliminate the flexibility offered by present arrangements. It is precisely because Sherman Act adjudication tended to thwart the achievement of such traditional union objectives in the labor market that the Clayton and Norris-LaGuardia legislation created an exemption for union activity in pursuit of those objectives.

Equity has not occupied the field in either the hiring or bargaining areas; it has permitted agents to function in both, on condition that they observe minimum standards of fairness in dealings with members and do not undermine the union-negotiated minimum wage and working conditions. As *Carroll's* holding with respect to booking agents illustrates, a union acts in its legitimate self-interest and is engaged in a "labor dispute" under Norris-LaGuardia when it seeks to regulate wage or job competition among members whose employment is arranged through agents, and to ensure that the agents' performance of traditional union functions conforms to union standards.

Petitioners claim that agents in this industry are indistinguishable from "numerous other groups of persons who merely supply products and services to union members," such as landlords, grocers, accountants and lawyers (Pet. Br. 24). The findings of both courts below, which petitioners do not dispute, make clear that agents differ from these groups in two respects: control of access to jobs and negotiation of terms of employment. For the

actor, agent commissions are not a discretionary expenditure of "disposable income," but are incurred as an inevitable concomitant of obtaining employment. The amount an actor receives in wages is, as the District Court below noted, "directly and proportionately related" to the amount that goes to the agent in commissions. 478 F.Supp. at 504 [Pet. App. B9(c)]. Equity's members are plainly engaged in a "labor dispute" under Section 13 with petitioner agents "concerning the representation of persons . . . in seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §113. Petitioners' argument simply ignores Congress' judgment that a union's legitimate interests may extend beyond the immediate employer-employee context, and its intent to ensure "that the [Act's] limitations . . . not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes . . ." H. Rep. No. 669, 72d Cong., 1st Sess. 11 (1932).

C. No Authority Exists for Denying the Labor Exemption to Equity's Agent Regulations Which Involve a Union's Effort to Improve Job Opportunities and Wages for Its Members, and Pose No Danger of Sheltered Competition in Product Markets.

Whatever the label affixed to the agents—whether they are deemed part of a "labor group," held to be in an "economic interrelationship" with Equity's members, or characterized as a "nonlabor group"—no authority exists for denying the labor exemption to Equity's agent regulations, which are maintained solely to benefit union members and are implemented and enforced through internal discipline of union members.[19] None of the concerns which have

[19] Even the licensing of agents is a formality. Equity accomplishes the same result whether it simply instructs its members to

prompted the Court to engage in close scrutiny of "combinations" or "agreements" with nonlabor groups are implicated in this case.

In every decision by this Court denying the labor exemption on grounds of impermissible combination with a nonlabor group, the Court has been concerned with restraints of the kind that business interests seeking to inhibit product market competition might undertake in the absence of the union. From *United States* v. *Brims*, 272 U.S. 549 (1926), cited by *Hutcheson* to illustrate union action in combination with a nonlabor group,[20] through the Court's recent decision in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters*, 421 U.S. 616 (1975), the impetus for judicial scrutiny has been the actuality of or significant potential for restraints on competition in the product market of the sort that businessmen in that market might undertake on their own.[21] And in every case, union members could

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deal only with agents who abide by specified standards, or whether it instructs them to deal only with agents who are formally licensed.

[20] The *Hutcheson* Court characterized *Brims* as "involving a conspiracy of mill work manufacturers, building contractors, and union carpenters." 312 U.S. at 232, n. 3. In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 501 (1940), the Court described *Brims* as a "case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices."

[21] In *Allen Bradley, supra*, the Court found that the union was aiding and abetting a business conspiracy to create a monopoly in the electrical equipment market. 325 U.S. at 798-801. The monopoly achieved, both prices and wages soared. *Id.* at 800.

The Court was careful to point out, however, that it was not simply the union's *agreement* with employers which created a combination with a nonlabor group falling outside the *Hutcheson* exemption:

> It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their

be seen to benefit from the monopoly objectives of employers or other restraint on product market competition. In essence, the Court has denied the labor exemption in cases where "benefits to organized labor [are] utilized as a cat's paw to pull [businessmen's] chestnuts out of the

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employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act.

325 U.S. at 809.

In *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), the union agreed with one group of employers to impose a certain wage scale on employers in other bargaining units, even though this might force some employers in the latter group to shut down their operations. The Court viewed the union's conduct as potentially creating a sheltered market: "One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy." *Id.* at 665-666. Justice Douglas, concurring, stressed the fact that "high wages and welfare terms of employment were imposed on the small, marginal companies by the union and the major companies with the knowledge and intent that small ones would be driven out of business." *Id.* at 675.

The concerns expressed in *Allen Bradley* and *Pennington* also moved the Court in *Connell,* where the union obtained agreements with general contractors which endowed it with the power to establish a sheltered market for unionized subcontractors seeking contracts with the general contractors. The agreements required the general contractors to subcontract only with firms which had collective bargaining agreements with the union, thus giving the union power to exclude from competition in the product market any subcontractor with which the union refused to sign an agreement:

> [I]f the union thought the interests of its members would be served by having fewer subcontractors compete for the available work, it could refuse to sign collective-bargaining agreements with marginal firms. Cf. *Mine Workers* v. *Pennington, supra.* Or, since Local 100 has a well-defined geographical jurisdiction, it could exclude "traveling" subcontractors by refusing to deal with them. Local 100 might thus be able to create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley, supra.*

421 U.S. at 624-625.

antitrust fires." *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949).

There is here no comparable danger—actual or potential—of a conspiracy of businessmen to dampen or exclude competition to which the union lends assistance in the hope of sharing through higher wages in the fruits of a sheltered market. Unlike an *Allen Bradley* situation, Equity's members would not benefit from monopoly power in the hands of particular agents, since diminished competition among agents would not increase the profits to producers who employ actors and pay their wages. Nothing in the record, economic theory or common sense suggests that reducing competition among agents could benefit Equity's membership. To the contrary, Equity has every interest in maximizing the number of agents: the greater the number of agents, the better the quality of services rendered to members.[22] Equity's sole concern is that competition among agents not take place in a manner which compels its members to absorb wage cuts—in the form of excessive commissions or commissions invading minimum scale—or subjects them to unfair practices or indignities. In short, the instant case simply does not give rise to the concerns expressed in *Allen Bradley* and its progeny where unions entered into nonexempt combinations or agreements with nonlabor groups.

D. Petitioners' Attempts to Distinguish the Instant Case From *Carroll* Are Without Merit.

Petitioners seek to sidestep the controlling force of *Carroll* in a variety of ways, none of which withstands analysis or relates to considerations that properly govern availability of the statutory exemption.

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[22] Indeed, vigorous competition among agents could lead to the charging of commissions below Equity's ceilings.

First, petitioners argue that the plaintiffs in *Carroll* were not full-time professional booking agents. This factual premise is at the very least questionable.[23] Moreover, whatever their other concerns, the *Carroll* plaintiffs were also challenging the union's "regimentation of booking agents." *See, e.g.,* Cross Pet. for Writ of Certiorari, No. 310 (O.T. 1966), p. 6 (Question Presented No. 20). This Court rejected the challenge notwithstanding the absence of wage or job competition between union member and agent.[24]

Second, petitioners contend that the presence of collective bargaining agreements between Equity and producers deprives Equity of the labor exemption. This argument is totally irrelevant to, *inter alia,* union restrictions on agent commissions, a principal feature of the regulations at issue

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[23] This Court noted that plaintiffs Carroll and Peterson, though expelled from membership, were "still permitted to book engagements and hire musicians to play at them but [could not] appear with their orchestra either as conductors or instrumentalists." 391 U.S. at 103, n. 5.

Contrary to petitioners' suggestion (Pet. Br. 18-19), whether or not Carroll and Peterson were part of a "labor group" of performing orchestra leaders who could be compelled, in that capacity, to join the union, *see* 241 F. Supp. at 890, Judge Levet clearly held that independent businessmen functioning as booking agents constituted a "labor group" subject to the AFM's booking agent regulations, including its restrictions on commissions, *see id.* at 892-93.

[24] The lower courts have uniformly applied *Carroll* to regulation of full-time talent agents. *See Redfield* v. *American Fed. of Musicians,* No. 78-7530, 603 F.2d 214 (2d Cir. Mar. 1, 1979); *Garrett* v. *American Fed. of Musicians,* 98 L.R.R.M. 2078 (D.S.C. 1978); *Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F.Supp. 403 (C.D. Cal. 1976) (denying preliminary injunction). *Home Box Office, Inc.* v. *Directors Guild of America, Inc.,* 83 F.R.D. 423, 425 (S.D.N.Y. 1979), relied on by petitioners, simply expressed a reluctance to grant summary judgment and, in any event, involved a union's attempt to organize and bargain on behalf of independent free-lance directors, not restrictions on agent commissions or operations for the benefit of undisputed employees.

in *Carroll* and in the instant case.[25] As the Court of Appeals determined, full elimination of wage competition in this industry extends beyond collective bargaining agreements: "In industries where it is necessary or customary for union members to secure employment through agents . . . the union cannot eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d at 650-651 [J.A. 347-348]. Unregulated agent commissions would compel actors who are competing among themselves for work to absorb "wage cuts" in the form of whatever commissions agents will charge.

Moreover, petitioners misstate the facts of *Carroll*. Although collective bargaining agreements were not used in the club-date field, the AFM set the minimum terms and conditions—the functional equivalent of a collective agreement—upon which purchasers of music could obtain the services of union members, and these were policed by AFM business agents, see 241 F. Supp. at 878 (Finding No. 82). Booking agent commissions were also regulated outside of the club-date field, where the employers of musicians typically entered into traditional collective bargaining agreements.[26]

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[25] Petitioners suggest that the supposed absence of collective bargaining agreements in *Carroll* required the AFM "to enforce its unilaterally imposed minimum scales . . . through direct vertical regulation of the booking agents who pay union members" (Pet. Br. 20). Nothing in Judge Levet's opinion supports the contention that even in the club-date field booking agents were involved in paying wages to AFM members. More importantly, petitioners never explain how this detail is related to the AFM's regulation of booking agent commissions.

[26] These agreements were listed by Judge Levet, see 241 F. Supp. at 883-84, and the point was noted in this Court, see 391 U.S. at 104, n. 6.

The Court of Appeals explicitly observed that the booking agent restrictions also applied in the steady engagement field and non-club date engagements [which] "are ordinarily governed by col-

Petitioners also urge that state regulation of employment agents repeals by implication the labor exemption.[27] Without authority, petitioners offer the remarkable proposition that the existence of some state protective legislation can render nonexempt legitimate union activity otherwise within *Hutcheson*. Under that theory, identical union activity would be subject to the Sherman Act in New York and not in states without analogous legislation.[28]

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lective bargaining agreements concluded by the union and the 'purchaser' of music." 372 F.2d at 158. It noted:

> *Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions,* because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the union. *The licensing agreements limit the commissions of booking agents to 10% for steady engagements* and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale.

Id. at 159 (emphasis supplied). For Judge Levet's finding to the same effect, see 241 F.Supp. at 881.

[27] The AFM licensing agreement in *Carroll* clearly assumed the existence of state regulations by requiring the licensed agent to "comply with all the laws, ordinances, and requirements of the different localities applying to such agencies." [J.A. 281, 74-75].

[28] Equity is a national union and its agency regulations apply nationwide. Moreover, the New York law, even where it applies, fails to address areas of legitimate union concern. For example, Equity regulates the duration of exclusive management contracts between actor and agent and specifies the conditions under which an actor can gain release from such contracts (e.g., where the agent is not providing work within specified time limits; where particular sub-agents upon whom the actor relied have left the agency). These safeguards, essential to the protection of Equity's members, find no analogue in New York law.

Finally, as the experience leading to the regulations upheld in *Edelstein* v. *Gillmore, supra,* illustrates, see p. 3, *supra,* the ex-

Petitioners further attempt to avoid *Carroll* by referring to Equity's prohibition of commission on scale wages, a feature present in the AFM regulations (see p. 17, n. 12, *supra*) and, in any event, offering no principled basis for distinguishing *Carroll*.

Equity's regulations are designed to protect those actors without established reputations who are most dependent on agents for access to jobs and who will receive only the minimum wage prescribed by the collective agreement with the producers. The agents are in direct competition with such actors for the "wage pot" available for minimum scale compensation, and but for Equity's regulation, their commissions would directly invade the scale which is the irreducible minimum for employment in the industry. Preservation of a minimum wage in this industry, as the Court of Appeals recognized, "poses problems of particular intractability," 622 F.2d at 651 [J.A. 348], where engagements are often short-term, with substantial intervening periods of unemployment. Each time an actor is hired, irrespective of the length of the previous engagement, the agent charges a commission; the commission is not a one-shot expenditure as it may be in other industries. Under the labor exemption, actors may combine through their union to ensure that those with the least bargaining power will receive the minimum set in the collective agreement, and to increase the incentive for agents to try to obtain

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istence of a state statute does not guarantee adequate enforcement of its provisions. Indeed, the record here discloses that petitioners did not even comply with the law which they claim renders Equity's regulations unnecessary. For example, after they relinquished their Equity licenses and ceased using Equity's standard form contracts between actor and agent, almost none complied with the statutory requirement (see New York General Business Law, Sections 183, 185) that written contracts between actor and agent be provided to the actors and kept on file in the agency. [J.A. 116-119, 178, 181-182].

more than the minimum.[29] As long as Equity is acting free of combination with nonlabor groups in an area of bona-fide union concern, *Hutcheson* precludes judicial weighing of "the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness," 312 U.S. at 232, of its objectives.[30]

E. Petitioners' Invitation to Overrule *Carroll* Should Be Declined.

This Court should decline petitioners' invitation to overrule *Carroll*. "The doctrine of *stare decisis* imposes a severe burden on the litigant who asks [this Court] to disavow one of [its] precedents." *Thomas* v. *Washington Gas Light Co.*, —— U.S. ——, 100 S.Ct. 2647, 2656 (1980). Far from carrying that burden, petitioners offer no justifica-

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[29] As noted, the agent takes his commission out of the difference between actual salary and minimum, until the 10% maximum is reached. The agent's principal concern, moreover, is to develop ongoing relationships with actors who will command far more than scale.

The minimum wage in 1977 on Broadway—the premier placement for stage actors—was $355.00. With increasing inflation, the figure may someday be, as petitioners suggest (Pet. Br. 31), $1000 a week or more; what may constitute a minimum wage in this industry has no bearing on the availability of the statutory exemption.

[30] With respect to the licensing fees, both courts below found that the fees were reasonably related to Equity's costs in implementing the agent regulations. A factual finding by both courts below should not be disturbed in the absence of a showing of patent error, see *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 375 (1949)—a showing not even attempted here. These relatively nominal fees—averaging $60 a year (a total of $12,000 for all agents)—were not "incommensurate with Equity's expenses in maintaining a full-time employee to administer the system," 622 F.2d at 651 [J.A. 351], and represent in part the rendition of services to the agent, including arbitration in the event of disputes over the commissions due. As the Court of Appeals put it, these fees are not "exactions . . . unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor." *Id.*

tion for asking this Court to overrule a statutory ruling, even though "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 736 (1977), citing *Edelman* v. *Jordan,* 415 U.S. 651, 671 (1974); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting). *Carroll* was cited with approval in *Connell Construction Co.* v. *Plumbers & Steamfitters, supra* 421 U.S. at 622. Post-*Carroll* litigation has been sparse, with each decision faithful to this Court's resolution of the issue. The radiations of *Carroll* have not been felt beyond the entertainment industry context which gave rise to the need for union regulation of employment agents. The scholarly literature offers no criticism of the aspect of *Carroll* dealing with booking agents.[31] The *Carroll* decision is wholly consistent with labor-antitrust jurisprudence. Petitioners' sole recourse, if any, is to the national legislature.[32]

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[31] To the extent the commentators cited by petitioners [Pet. Br. 16, n.6] are critical of *Carroll,* their focus is the part of the Court's decision upholding the union's prescription of the minimum prices that even orchestra leaders who did not lead could charge purchasers of music. There is no similar danger in this case, however, that the beneficiary of the union-set "price" will be a business group, rather than the workers themselves. *Compare Carroll,* 391 U.S. at 117 (White, J., dissenting).

[32] The courts below did not reach a number of substantial issues. One such question is whether the injunction petitioners seek, unaccompanied by any request for declaratory relief, is beyond the equity jurisdiction of the federal courts by virtue of the Norris-LaGuardia Act. See *Milk Wagon Drivers' Union* v. *Lake Valley Co., supra,* 311 U.S. at 103; *Telegraphers* v. *Chicago & N.W.R. Co.,* 362 U.S. 330, 339 & n.15 (1960); *Connell Construction Co.* v. *Plumbers & Steamfitters, supra,* 421 U.S. at 637, n.19; *Utilities Ser. Eng.* v. *Colo. Bldg. & Constr. Trades,* 549 F.2d 173, 177-178 (10th Cir. 1977). Even if this case involved union participation in an independent business conspiracy of the type present in *Allen Bradley,* a federal injunction may reach only the combination and

not acts protected under the Clayton and Norris-LaGuardia Acts. *See Allen Bradley, supra,* 325 U.S. at 812.

In their conclusion (Pet. Br. 33-34), petitioners suggest that this Court should depart from its usual practice and address two other issues—the availability of the nonstatutory exemption and the applicability of a *per se* test—neither decided below nor "specifically brought forward by the petition," *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 177 (1938); *compare New York Transit Authority* v. *Beazer,* 440 U.S. 568, 583, n.24 (1979) (issue decided below and carefully briefed in this Court; consideration of the issue might obviate a constitutional ruling).

In any event, petitioners are incorrect in their suggestion that the nonstatutory exemption is unavailable simply because the agents are not in a collective bargaining relationship with Equity, irrespective of the need of members for protection from agents or the reasonableness of the protective conditions fashioned in response. *Connell* does not support this harsh vision, in which the statutory exemption is denied because of the presence of collective agreements and the absence of job competition between actor and agent, and the nonstatutory exemption is withheld because agents are not the employers of actors. *Connell* addressed facts involving a potential *Allen Bradley* situation in which the union had obtained the power to exclude firms from the subcontracting market on grounds unrelated to wages, hours and working conditions. In the context of a combination with employer groups to exclude competitors in the same product market, there may be force to the Court's observation that a federal labor policy favoring collective bargaining was not implicated by an agreement unlawful under the National Labor Relations Act between a union and a general contractor with whom the union did not seek a bargaining relationship. But *Connell* did not purport to deal with all types of union agreements with nonlabor groups or with every conceivable justification grounded in federal labor policy that may be advanced for such agreements. Equity's agent regulations exclude only those unwilling to conform to the union's protective standards, and are at least as "intimately related to wages, hours and working conditions of union members" as the operating hours restriction held antitrust-exempt in *Meat Cutters* v. *Jewel Tea Co., supra,* 381 U.S. at 689.

Petitioners' further suggestion that Equity's regulations are *per se* invalid under the Sherman Act is unsupported. "[T]he Court [in *Jewel Tea*] intended that there be a full-scale rule of reason inquiry in every instance in which a nonexempt activity is claimed to be in violation of antirust." Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 239-240 (1971). *See also*

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JEROME B. LURIE
COHN GLICKSTEIN LURIE OSTRIN
LUBELL & LUBELL
1370 Avenue of the Americas
New York, New York 10019
(212) 757-4000
Counsel for Respondents

Of Counsel:
SIDNEY E. COHN
MARY K. O'MELVENY
NAN BASES

SAMUEL ESTREICHER
40 Wash. Sq. So.
New York, N.Y. 10012

DiCola, Labor Antitrust: *Pennington, Jewel Tea* and Subsequent Meandering, 33 U. Pitt. L. Rev. 705, 715 (1972); Comment, 80 Colum. L. Rev. 645, 662 (1980). In any event, irrespective of federal labor policy, the union activity in this case involves at most a concerted refusal to deal by actors, the consumers of the agents' services, and not a classic commercial boycott between competing "trader" groups. This Court's recent decisions make clear that "boycott" and "price-fixing" labels do not themselves identify the circumstances warranting *per se* treatment. *See St. Paul Inc. Co.* v. *Barry*, 438 U.S. 531, 542-543 & n.14 (1978); *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 9 (1979); *see also Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Boycotts of the type involved in this case should be measured against the "rule of reason." *See generally* L. Sullivan, Antitrust §90, at 256 (1977) (classic boycott is "a concerted refusal aimed at depriving competitors of some needed resource and thus making it harder for them to compete"); *id.* at 262 (suggesting that a farm workers' consumer boycott of nonunion grapes is not *per se* violative of the Sherman Act); Coons, Non-commercial Purpose as a Sherman Act Defense, 56 Nw. U.L. Rev. 705 (1962).